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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ANDREW ESCHWEILER,

Petitioner,

-V-

UNITED STATE OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To The

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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(a)

QUESTIONS PRESENTED FOR REVIEW

1. Does repeated warrantless participant monitoring in a private residence violate the homeowner's Fourth Amendment rights?

2. Does Congress' stated intention to limit the one party consent exception to the Federal Anti-Eavesdropping statute, 18 U.S.C. §2510 et seq., to then existing law, limit the government's power to use consensual monitoring in a private residence?

3. Does the "practical near immunity" of a lying government witness from a perjury prosecution, violate the accused's right to confrontation and due process?

4. Where the issue of a paid informant's mental capacity to give valid consent to wearing eavesdropping devices is raised in Pre-trial motions, does judicial expediency justify the denial of an accused's request for a Pre-trial psychiatric examination of the informant?

(b) LIST OF PARTIES

All parties to the lower court proceedings appear on the title page. They are: 1) The Petitioner, Andrew Eschweiler, Defendant below, and 2) The United States of America, Respondent herein, Plaintiff below.

(c) TABLE OF CONTENTS

Questions Presented for Review	1
List of Parties	2
Table of Contents	2
Table of Authorities	3
Reference to Reports	5
Statement of Jurisdictional Grounds	6
Statutes and Constitutional Provisions involved	7
Statement of the Case	8
Basis for Federal Jurisdiction	14

Reasons for Allowance of the Writ 15

Appendix

A. Opinion of the Seventh Circuit Court of Appeals.....A1
B. Order of the Seventh Circuit of Appeals denying the Petition for Rehearing.....A11
C. Memorandum Opinion of the District Court denying Defendant's Pre-Trial Motions.....A12
D. The Eavesdropping Statute, Title 18 U.S.C. §2510 et seq.....A17

c) TABLE OF AUTHORITIES

Primary Authority

Jandak v. Village of Brookfield, 520 F. Supp 815 (N.D. Ill, 1981) 21,22

Katz v. United States, 389 U.S. 347 (1967) 18

Lewis v. United States, 385 U.S. 206 (1966) 13,19

Lopez v. United States, 373 U.S. 431 (1963) 13,16, 22,23

On Lee v. United States, 343 U.S. 747 (1952) 22,23

Stanley v. Georgia, 394 U.S. 557 (1969) 19

U.S. v. Baker, 430 F. 2d 499 (19) 27

U.S. v. Karo, __U.S.__, 104 S.Ct. 3296 (1984) 17

U.S. v. Napier, 451 F.2d 552 (1971) 27

U.S. v. Waterman, 732 F.2d 1527 (1984) 26

U.S. v. White, 401 U.S. 745 (1971) 13,18

Secondary Authority

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974) 19

LaFave, Search and Seizure, A Treatise on the Fourth Amendment (1979) 19

Posner, Richard A., The Uncertain Protection of Privacy by the Supreme Court, Supreme Court Review (1979) 19

(d) REFERENCE TO REPORTS

The judg ment of the District Court below is unreported. The Memorandum Decision in the case, 83 CR 61, is reproduced here as Appendix C to this Petition.

The opinion of the Seventh Circuit Court of Appeals has not yet been published in an Official Reporter. It has been published by West Publishing Co. at 745 F. 2d 435. The Advance Sheet is dated November 26, 1984, Number 49. The draft opinion is reproduced here as Appendix A to this Petition.

The order of the Seventh Circuit Court of Appeals denying the Petition for

Rehearing with Suggestion for Rehearing In Banc is reproduced here as Appendix B to this Petition.

(e)

STATEMENT OF JURISDICTIONAL GROUNDS

1. The jurisdiction of the District Court for the Northern District of Illinois was invoked pursuant to Title 21, U.S.C. §841(A)(1). That statute invokes federal jurisdiction in cases involving the possession and trafficking of certain narcotics. A conviction was entered in that case on July 28, 1983. Sentencing was held on September 19, 1983, and a timely Notice of Appeal was filed on September 27, 1983.

2. The jurisdiction of the Seventh Circuit Court of Appeals was invoked pursuant to Title 28, U.S.C. §1291, an appeal from a conviction in the U.S. District Court. The opinion of the Court of Appeals was rendered on September 21, 1984. That opinion affirmed

the findings of the District Court on all substantive issues.

3. A timely Petition for Rehearing with Suggestion for Rehearing In Banc was filed on October 10, 1984, pursuant to Rule 40 of the Federal Rules of Appellate Procedure. That Petition for Rehearing was denied on October 24, 1984.

4. No cross petition has been filed.

5. The jurisdiction of the U.S. Supreme Court to review the judgment by Writ of Certiorari is conferred by Title 28, U.S.C. §1254(1). The Petition for Writ of Certiorari is timely filed if done within sixty days of the denial of the Petition for Rehearing, or by December 24, 1984.

(f) STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States provides in relevant part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

2. The Eavesdropping Statute, Title 18, U.S.C. §2510 et seq. in part along with pertinent legislative history is Appendix D.

(g) STATEMENT OF THE CASE

Harold Abrahamson, the informant, came to Eschweiler's home on three occasions equipped with a NAGRA recording device hidden on his person. F.B.I. agents had intended to monitor certain conversations electronically from various locations near Eschweiler's home. The F.B.I. had no prior experience with Abrahamson, and no prior contact with Eschweiler. The first tape revealed Eschweiler at home, baking cookies, discussing domestic matters, and talking about drugs in general. While there, Abrahamson talked with a guest named Michael Dickie. He inquired about Dickie's job, and engaged him in casual conversation. Abrahamson even bragged

to Dickie about carrying a gun. No drug transaction was discussed by Abrahamson and Eschweiler during this first tape recorded session.

The second tape was made approximately five weeks later. Abrahamson entered Eschweiler's home while there was a party in progress. Abrahamson asked one of the guests, another man named Michael, about his occupation and about his sexual preference. Michael's reply was recorded and later transcribed by the government, along with less intrusive party talk involving other individuals who also did not know that their conversations were being audited by the government. The only evidence the government gleaned out of this second tape, and the twenty one page transcript thereof, was Abrahamson's statement to Eschweiler that he wanted to pick up one half ounce of cocaine within a couple of days. He said that he would call Eschweiler

within the next two days, to which Eschweiler agreed.

The third and final session recorded the sale of one half ounce of cocaine by Eschweiler to Abrahamson.

The tapes were then used to obtain a search warrant for Eschweiler's apartment. The executing officers found drugs, drug paraphernalia, a safety deposit box key, and deposit box receipt. They arrested Eschweiler during this search. Agents later obtained another search warrant, opened the safety deposit box, and found both cocaine and cash, including most of the marked money used by Abrahamson to make the cocaine purchase from Eschweiler.

Eschweiler was charged in a five count indictment. One count for the sale of one half ounce of cocaine, three counts for possession with intent to deliver the drugs and marijuana found in the apartment, and one count for the cocaine found in the

safety deposit box.

The Defendant's Pre-Trial motions to suppress the tape recordings, to quash warrants based on the tape recordings, to suppress as evidence the contents of the safety deposit box, and to compel a psychiatric examination of Abrahamson to determine his mental capacity to give valid consent to the governmental monitoring were all denied by the District Court judge. (See the Memorandum Opinion, Appendix C)

At the jury trial, excerpts from all three tapes were played. Abrahamson, the F.B.I. agents, and an employee of the safety deposit box company all testified.

On cross examination, Abrahamson admitted that he had perjured himself before the grand jury in the case, and that he had lied earlier during his direct testimony.

The F.B.I. agent in charge of the case admitted that Abrahamson had lied to her about certain matters. She did not

realize until later that she had incorporated in her sworn testimony his detailed lies about seeing Eschweiler prepare and package the half ounce of cocaine. The statement was sworn to again in the search warrant affidavit, in her preliminary hearing testimony, and in the prepared grand jury statement.

The physical evidence was introduced with a stipulated chemical analysis. The jury returned a verdict of guilty on all counts, and Eschweiler was sentenced to five years in prison.

The Seventh Circuit Court of Appeals opinion affirming the conviction was filed on September 21, 1984. (See Appendix A) That Court denied the Petition for Rehearing with Suggestion for Rehearing In Banc on October 24, 1984. (See Appendix B)

The Seventh Circuit held that:

a) There was no Fourth Amendment violation because the Assumption of Risk

Doctrine takes warrantless participant monitoring out of the area of Fourth Amendment protection, even when that monitoring is done in the defendant's home because:

1) there is no legal difference between this case and precedent which holds that a speaker assumes the risk that he is talking to a government agent who is transmitting and recording for the government; viz., U.S. v. White, 401 U.S. 745 (1971) (plurality opinion), and Lopez v. United States, 373 U.S. 427 (1963);

2) Lewis v. United States, 385 U.S. 206 (1966), authorizes government undercover agents to enter a home to transact illegal business.

b) There is no federal eavesdropping violation because the exception to the federal eavesdropping statute, Title 18 U.S.C. §2510 et seq., which expressly authorizes one party consensual monitoring, 18 U.S.C. §2511(2)(C), covers repeated consensual monitoring of conversations within a home

despite the Defendant's argument that Congress did not intend this exception to be that broad.

c) Government witnesses like Abrahamson who lie under oath enjoy a "practical near immunity" from perjury prosecutions, and there is no Sixth Amendment violation.

d) Even though Abrhamson may have been delusional and in a self induced drug stupor (App. A5), any informant's mental capacity to consent to wearing a microphone is "too collateral an issue in a criminal trial..." (App. A5) to require a psychiatric examination of the informant whose competence has been put in question.

i) BASIS FOR FEDERAL JURISDICTION

The trial was conducted in a United States District Court based upon an indictment returned by a federal grand jury, alleging violations of various sections of Title 18, U.S.C.

(j)

REASONS FOR ALLOWANCE OF THE WRIT

A. REPEATED WARRANTLESS PARTICIPANT MONITORING IN A PRIVATE RESIDENCE VIOLATES THE FOURTH AMENDMENT.

The Seventh Circuit has done what no American Court ever before attempted. It has sanctioned as a "customary method of criminal investigation" (App. A3) a technique which allows the government open-ended and general seizures of conversations within a private residence. With this precedent, there is no requirement that there be a showing of probable cause that the conversations to be recorded and monitored in the home will involve evidence of a crime, no standard to avoid recording conversations with innocent people who are not under investigation, no limit on the frequency or duration of the monitoring, and no notice requirement to let monitored, non-targeted individuals know that their conversations have been recorded by the

government. Apparently, the Seventh Circuit feels that there is no difference between letting I.R.S. agent Davis record one conversation involving a possible bribe with a citizen, in the citizen's office when the investigator was invited to be solicited for the bribe as in Lopez v. United States, 373 U.S. 431 (1963), and this situation, where the informant came repeatedly to the citizen's home to capture on tape whatever he could.

What makes this precedent especially egregious is permitting this participant monitoring tool to be extended to the home, and broadened to permit unlimited monitoring. That is, permitting the government to spy on the home not only without any judicial supervision, but without any effective control by the law enforcement agents over the informant-participant. Other than equipping him with the eavesdropping devices and driving him to Eschweiler's residence,

the F.B.I. let Abrahamson operate on his own. This is a man whose "...personal reliability was not great" (App. A3), who successfully deceived the F.B.I. (App. A5), who often told lies (App. A5), whose own statements on the tapes, false testimony before the grand jury (App. A5), and at trial, indicate that he was paranoid (TR. 283), grandiose, and delusional (App. A5). Abrahamson was, at times while wearing the devices, out of control (TR. 277). Thus, the decision as to how intrusive the monitoring was to be was left not to the discretion of a professional law enforcement agent, but to the judgment of a borderline mental case. The intrusion here was extremely careless.

This Court reached the threshhold of this question in a footnote to a recent decision, United State v. Karo, __U.S.___, n. 4, 104 S.Ct. 3296 at 3304, 82 L.Ed 2d 530 at 542 (1984). But the statement there

that a homeowner has no reasonable expectation that a person invited into his home will not be wired with a microphone that transmits conversations in which he engages, is based on a broad reading of the plurality opinion in United States v. White, 401 U.S. 745 (1971). In the White decision, only one of the eight monitored conversations was in White's home. Here, the monitoring in Eschweiler's home was repeated. The Court in White did not address as a separate issue the special expectation of privacy involved in monitoring conversations in the home. Rather, the focus was the application of Katz v. United States, 389 U.S. 347 (1967), to the techniques of warrantless participant monitoring previously approved of in Lopez v. United States, 373 U.S. 427 (1963) et al.

But sanctioning the routine use of this technique to allow the government to listen into the private residence should be the result of a critical and explicit

balancing of social values versus law enforcement goals. LaFave, Search and Seizure, 2.2(e) pg. 279 (1978). The doctrine of fictitious consent has been criticized by many commentators, viz. Amsterdam, 58 Minn. L. Rev. 349 at 406 and 407 (1974). One commentator even called it an absurdity, "Consent is vitiated by fraud," Posner, The Uncertain Protection of Privacy by the Supreme Court, Supreme Court Review 173, 188 (1979). This doctrine should not be extended perfunctorily into the home.

Surely, the concept of the home as a refuge against the world is an American (and Anglo Saxon) value worth preserving. If the Constitution restrains the government from knowing the titled in a man's library, Stanley v. Georgia, 394 U.S. 557 (1969), is not the recording of the thoughts expressed by a man in his own home equally repugnant to the Constitution? In Lewis v. United States, 385 U.S. 206 (1966), the

undercover agent was planted specifically to transact illegal business. Here, Abrahamson was welcomed initially as a social guest, and the government heard and recorded all the intimate and private conversation (App. A3) "in a home rather than in a more conventional place of business." (App. A3) Should not the government be required, at the very least, to show that other, less intrusive forms of investigation would not have been adequate?

Yes, this was a successful narcotics investigation and prosecution. But what price do we pay as a society?

B. REPEATED WARRANTLESS PARTICIPANT MONITORING OF CONVERSATIONS WITHIN THE DEFENDANT'S HOME IS ILLEGAL UNDER 18 U.S.C. §2511.

18 U.S.C. §2511 outlaws the interception of any wire or oral communication and then provides exceptions: Subsection 2511 (2)(C) provides that interception of a communication does not violate the statute if the interception is done with the consent of one of the parties to the communication. It is under the colorable authority of this exception that the government in this case overheard and recorded the conversation in Eschweiler's residence. This exception to 18 U.S.C. §2511 has been narrowly construed: "When considering a statute designed to protect privacy, a court must be reluctant to give expansive reading to the exceptions." Jandak v. Village of Brookfield, 520 F. Supp. 815 at 820 (N.D. Ill., 1981). After reviewing the legislative history of subsection 2511 (2)(C), Judge Leighton held that the consent exception contained therein could not be

expanded to include the implied consent of one of the parties to the conversation at issue in that case. Jandak, supra at 820.

The legislative history, S. Rep. No. 1097, 90th Cong., 2d Sess., 93094 (1968), reprinted in (1968) U.S. Code and Ad. News 2112 at 2182 (see Appendix D, page A18 of this Petition), limits 18 U.S.C. §2511(2)(C) to then existing law. Neither Lopez v. United States, 373 U.S. 427 (1963), nor On Lee v. United States, 343 U.S. 747 (1952), cited by Congress as examples of "existing law," involved monitoring conversations in the home. The conversation between Lopez and I.R.S. agent Davis was transmitted and tape recorded on October 24, 1961, in Lopez's office at Clauson's Inn which was operated by Lopez under a lease. On Lee's conversation with Chin Poy, an undercover Bureau of Narcotics informant, was transmitted by hidden microphone from the customer's room of On Lee's laundry. The customer's room,

unlike the living quarters in back, was visible through a large front window and the incriminating statements were made during the course of conversation that took place in an area where customers came and went. Both Lopez and On Lee involved just one communication between agent or informant and suspect. Both Lopez and On Lee involved situations where due to location of the conversation, or limitation on technology at the time, the government's uninvited ear was limited to hearing just the conversation with the suspect.

Clearly the legislative history of 18 U.S.C. §2511(2)(C) indicates that by specifically limiting the reach of that subsection to then existing law, and citing as examples the Lopez and On Lee cases, Congress never enacted an exception to the eavesdropping prohibition which would permit the government to repeatedly monitor a home with equipment that could

isolate and render audible to the government every sound within the home. Congress never authorized such an Orwellian intrusion into a private residence. The repeated, warrantless monitoring of Defendant's home in this case violated 18 U.S.C §2511.

C. "PRACTICAL NEAR IMMUNITY" FROM PERJURY PROSECUTIONS FOR THE GOVERNMENT'S CHIEF WITNESS VIOLATES DUE PROCESS.

It is refreshing to have a Circuit Court of Appeals admit that government witnesses enjoy "practical near immunity" from prosecution for perjury. (App. A6)

Abrahamson lied so often (App. A5) in this case, both on and off the stand, that one needed radar to find the truth in some of his statements.He admitted committing perjury before the grand jury (TR. 176,188). He was caught during his cross examination in direct contradiction of his own trial testimony (TR. 135, 155, 160, 195, 201, etc.). He deceived the F.B.I. agent about carrying

a gun (TR. 159), and he allowed the Assistant U.S. Attorney to help him prepare a statement which he subsequently read under oath to the grand jury which was untrue (TR. 174, 175, 290, 291).

After discovering his deceptions, but before he testified at trial, the F.B.I. still continued to help him with other criminal warrants (TR. 259, 260). Abrahamson knew that he had nothing to fear from the government if he continued to lie in this case while on the witness stand (TR. 195). No wonder he merely smiled at the end of a series of impeachments of his own testimony (TR. 194, 195).

Though the oath was meaningless as applied to the government's witness here, the Seventh Circuit's "practical near-immunity" standard establishes a general principle that government witnesses need not worry about telling the truth under oath. Of course this denies the accused his Sixth

Amendment right to confront his accusers. It seems especially unfair since the oath is usually enforced rigorously against the defendant who takes the stand, is convicted, and then suffers an enhanced sentence if the trial judge feels he lied under oath.

The Eighth Circuit is more sensitive to the integrity of the fact finding process. In United States v. Waterman, 732 F.2d 1527 (8th Cir., 1984), they disapprove a contingent arrangement which might encourage the government witness to lie. In this case, where the government's witness admits on the stand that he actually committed perjury, the Seventh Circuit shrugs it off. (App. A5)

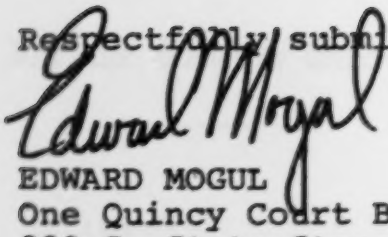
Defendant urges that where, as here, a government witness admits on the witness stand that he has committed perjury, then on motion of the trial judge, or at the instance of either counsel, a special prosecutor should be appointed to determine whether a perjury prosecution is appropriate.

To leave the enforcement of the oath in the hands of the party who has the least incentive to enforce it, has lead to the embarrassing admission by the Seventh Circuit Court of Appeals that one side in a criminal prosecution need not be bound by the oath.

D. PRE-TRIAL PSYCHIATRIC EXAMINATION OF THE INFORMANT TO DETERMINE CAPACITY TO GIVE VALID CONSENT.

The Seventh Circuit ruled on the grounds of judicial expediency in criminal prosecutions that a psychiatric examination would not be required even where the issue has been raised of an informant's mental capacity to give valid consent to waiving his and another's Fourth Amendment rights (App. A4, A5). The Fifth Circuit and the Court of Appeals for the District of Columbia seem to take a different view. United States v. Napier, 451 F.2d 552 (5th Cir. 1971), and United States v. Baker, 430 F.2d 499 (C.A.D.C.).

Respectfully submitted,



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In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2747

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDREW ESCHWEILER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 CR 61—**Thomas R. McMillen**, *Judge.*

ARGUED JUNE 8, 1984—DECIDED SEPTEMBER 21, 1984

Before CUMMINGS, *Chief Judge,* and CUDAHY and POSNER, *Circuit Judges.*

POSNER, *Circuit Judge.* Andrew Eschweiler was convicted by a jury of federal narcotics violations and was sentenced to five years in prison. His appeal raises a number of questions, most revolving around Harold Abrahamsen, who as government informer and prosecution witness played a key role in Eschweiler's apprehension and conviction.

Eschweiler sold cocaine and other illegal drugs from his apartment. He befriended Abrahamsen and let him live in the apartment rent free. Abrahamsen bought some drugs from Eschweiler for his own use and that of his friends, and also assisted Eschweiler in a minor way in his dealings. Abrahamsen needed money, and went to the

FBI and offered to help apprehend Eschweiler if the FBI would pay him for his services. The FBI accepted the offer; and fitted out with a recording device, Abrahamsen thrice visited Eschweiler's apartment (Abrahamsen was no longer living there) and recorded conversations highly incriminating to Eschweiler. The prosecution played these conversations to the jury. Eschweiler's first argument on appeal is that the introduction of this evidence violated both the Fourth Amendment and the federal electronic-eavesdropping statute (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*).

Both the Fourth Amendment, by judicial interpretation, and Title III, expressly, allow an undercover agent to record his conversations with a suspect and allow the government to introduce the recording in evidence. See *Lopez v. United States*, 373 U.S. 427, 439 (1963); 18 U.S.C. §§ 2511(2)(c), 2515. Eschweiler points out, however, that *Lopez* did not involve a conversation in the suspect's home; notes that the Supreme Court has held that the home is entitled to special protection under the Fourth Amendment, see, e.g., *United States v. Karo*, 104 S. Ct. 3296, 3303 (1984); *Payton v. New York*, 445 U.S. 573, 589-90 (1980); and conjures up a frightening specter of the government's sending undercover agents into the home to record every sound audible there, using "enhancement" devices to enable the recording of sounds in other rooms besides the one the agent is in.

But this is not the case in which to decide whether *Lopez* or Title III should be deemed inapplicable to surveillance within the home (a difficult position to sustain in the face of cases like *United States v. White*, 401 U.S. 745, 747 (1971) (plurality opinion); *United States v. Janik*, 723 F.2d 537, 547 (7th Cir. 1983), and *United States v. Yonn*, 702 F.2d 1341, 1346-47 (11th Cir. 1983)), or what difference amplification makes, or whether—though this is not something *we* are authorized to decide—the time has come to reconsider *Lewis v. United States*, 385 U.S. 206 (1966), which held that planting an undercover agent

does not invade any interests protected by the Fourth Amendment. See generally Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 Am. B. Foundation Research J. 1195. To begin with, this is not a case of an officer's worming his way into the confidence of a criminal suspect, gaining entry into the suspect's home, and then recording everything audible (and maybe some things not audible) within it. The FBI did not send one of its employees into Eschweiler's apartment; it did not even "turn" Abrahamsen; the initiative was his. This is a classic case of misplaced trust in an associate's loyalty. Once Abrahamsen decided to help the government, wiring him for sound was a reasonable measure to obtain reliable evidence of Eschweiler's conversations with him—particularly since, as we shall see, Abrahamsen's personal reliability was not great. It is true that, maybe because the conversations did take place in a home rather than in a more conventional place of business, the recordings captured many conversations of a private nature, conversations ranging from the lurid (sex) to the banal (baking cookies). But a drug dealer cannot obtain immunity from customary methods of criminal investigation simply by conducting his business in his home rather than in a regular office. *Lewis v. United States*, *supra*, 385 U.S. at 211. Eschweiler does not argue that the content of the recordings so prejudiced the jury against him as to deprive him of a fair trial.

He does argue that the microphone concealed on Abrahamsen was more sensitive than the human ear, suggesting a possible analogy to *Gouled v. United States*, 255 U.S. 298, 305-06 (1921), where the Supreme Court held that a government agent who had gained admittance to Gouled's office by pretending he was paying him a social visit could not, while Gouled was out of the room, ransack the office and seize private papers of an incriminating nature. (This holding is unrelated to the holding in *Gouled* that was overruled by *Warden v. Hayden*, 387 U.S. 294, 300-10 (1967)—that a search is improper if the object is merely to secure evidence. See 255 U.S. at 307-09.) Dicta

in *United States v. Llanes*, 398 F.2d 880, 884 (2d Cir. 1968), and *United States v. Agapito*, 620 F.2d 324, 330 and n. 7 (2d Cir. 1980), suggest that an undercover agent who uses amplifying equipment to overhear conversations in another room that would have been inaudible to his naked ear invades interests protected by the Fourth Amendment; and there are similar holdings with regard to spying on the interior of a house or an office building through a telescope or binoculars. See *United States v. Taborda*, 635 F.2d 131, 138-39 (2d Cir. 1980); *People v. Arno*, 90 Cal. App. 3d 505, 511-12, 153 Cal. Rptr. 624, 627-28 (1979); *United States v. Kim*, 415 F. Supp. 1252, 1255-57 (D. Haw. 1976). But there is contrary authority on telescopic and binocular observation, illustrated by *Commonwealth v. Hernley*, 216 Pa. Super. 177, 263 A.2d 904 (1970), including dicta in two Supreme Court decisions, *On Lee v. United States*, 343 U.S. 747, 754 (1952), and *United States v. Lee*, 274 U.S. 559, 563 (1927). And here there is the fact, which distinguishes *Llanes* and *Agapito*, that Eschweiler consented to Abrahamsen's presence. We know from *Lopez* that in order to be effective the consent did not have to extend to Abrahamsen's being wired. But there was also limited consent in *Gouled*. See also *Lewis v. United States*, *supra*, 385 U.S. at 211.

Fortunately we do not have to resolve the issue of amplification in this case. The only conversations used in evidence against Eschweiler were his own conversations with Abrahamsen, which of course Abrahamsen could and did hear; the amplifying feature of the equipment he wore did not produce any evidence used against Eschweiler.

The next issue is whether the district judge should have ordered Abrahamsen to submit to a psychiatric examination as a condition of letting the government proceed with its case. Eschweiler argues that Abrahamsen was mentally incompetent to agree to become an undercover agent for the FBI and insufficiently trustworthy to be allowed to testify at the trial. We have expressed recently our more than reluctance to encumber criminal proceedings with psychiatric examinations of witnesses, *United States*

v. Gutman, 725 F.2d 417, 420 (7th Cir. 1984), and nothing in this case causes us to change our position. It is true that Abrahamsen lied repeatedly to the FBI about whether he carried a gun (he did), and almost certainly lied when he told the grand jury that he had gone to the FBI to do his citizen's duty rather than to make money, and that he makes $36,000 a year—in fact he seems to have no regular work, and to live from hand to mouth. Besides often telling lies, Abrahamsen sometimes hallucinates—he has seen people coming up at him through the floor. These hallucinations apparently are drug-induced; and a doctor speculated that Abrahamsen may have been in a self-induced drug stupor when he decided to cooperate with the FBI. But neither the doctor's affidavit nor any other evidence about Abrahamsen's mental state required the district judge to order a psychiatric examination to determine the voluntariness of his agreement to become an undercover agent for the FBI. An informer's mental state is too collateral an issue in a criminal trial to require such an examination. As for Abrahamsen's competence to testify at trial (a different issue from the voluntariness of his consent to help the FBI), there is no serious argument that he was an incompetent witness as opposed to being an unreliable one; and his unreliability was an issue the jury was capable of evaluating without the help of a psychiatrist's report.

We also reject the argument that Abrahamsen should not have been allowed to testify because he was effectively immune from prosecution for perjury—that since he was the government's witness, the government would not prosecute him for perjury, provided he lied *for* the government. If accepted, this argument would make it impossible for anyone to testify for the government. An argument that leads to such a result cannot be right, and is in any event inconsistent with the principle that the government can agree not to prosecute a criminal in exchange for his testifying against his accomplices, see, e.g., *United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir. 1976), despite the obvious element of inducement to testify as

the government wants and the same practical near-immunity as in the present case from being prosecuted for perjury if the criminal lies in the government's interest. Of course there are limits to how far the government may go to induce a witness to cooperate. *United States v. Waterman*, 732 F.2d 1527 (8th Cir. 1984), on which Eschweiler relies, holds that the government goes too far when it "offer[s] favorable treatment to a prosecution witness contingent upon the success of the prosecution." *Id.* at 1531. We need not decide whether we agree with this, for there was no offer of favorable treatment to Abrahamsen, let alone an offer contingent on his getting the goods on Eschweiler. Abrahamsen was not the proverbial target of an investigation who turns state's evidence to save his own hide.

The remaining issues relate to the FBI's search of Eschweiler's apartment, a search based on the recorded conversations and other leads supplied by Abrahamsen. Eschweiler argues first that the judge should have held a hearing to determine whether the FBI agent who prepared the affidavit on the basis of which the search warrant was issued had knowingly included false statements in the affidavit. See *Franks v. Delaware*, 438 U.S. 154 (1978). Some of the information supplied by Abrahamsen was false, but there is no indication that the agent knew this. And there was so much indubitable evidence that Eschweiler was selling illegal drugs from his apartment—the evidence of the recorded conversations—that even if the agent had knowingly included false information in the affidavit, this could have made no difference to the magistrate's decision. The magistrate would have issued the warrant on the basis of the true information even if the affidavit had not been embellished with any of Abrahamsen's false statements, and therefore the district court was not required to hold a hearing to determine whether the agent knew the affidavit contained such statements. See *id.* at 171-72.

During the search, an FBI agent went through an overcoat that was hanging in a closet and in one of the pockets found a small envelope for a safe-deposit box key. He

opened the envelope (which was not sealed) and took out the key. On the basis (in part) of the key, the envelope, and a receipt, found elsewhere in the apartment, for the safe-deposit box, the government got a warrant to search the box, which contained cocaine and money. Eschweiler argues that the search of the envelope and the seizure of the key violated his rights under the Fourth Amendment and that the evidence seized from the safe-deposit box should have been suppressed as the fruit of the violation.

Since the warrant to search the apartment mentioned cocaine and money among the items to be seized in the search, the agent was entitled to go through the pockets of the overcoat; for either cocaine or money could easily have fit into a pocket. See 1 Ringel, Searches & Seizures, Arrests and Confessions § 6.5(a) at p. 6-27 (2d ed. 1984); cf. *United States v. White*, 706 F.2d 806, 808 (7th Cir. 1983). It is not as if the agents had been searching for the Maltese falcon. Although the envelope that the agent drew out of the overcoat pocket did not contain cocaine or money, it was unmistakably an envelope for a safe-deposit box key; it *said* safe-deposit box key, and had the name of the bank on it. The agent was entitled to infer that Eschweiler had a safe-deposit box that might well contain cocaine, money from selling cocaine, or both. The inference was strengthened by the fact that the government had given Abrahamsen $1,250 in marked bills to buy cocaine from Eschweiler and he had spent it for that purpose, yet none of the money was in the apartment. All but $20 of it was found in the safe-deposit box.

The incriminating evidence (more precisely, the leads to incriminating evidence), consisting of the envelope and the receipt, was in plain view, and therefore could lawfully be seized without a warrant for it. See *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (plurality opinion); *United States v. McDonald*, 723 F.2d 1288, 1294-96 (7th Cir. 1983); cf. *Marron v. United States*, 275 U.S. 192, 199 (1927). Although it can be argued that the agent who opened the envelope and took out the key was conduct-

ing a further search and seizure not authorized by the search warrant and not permitted by the Fourth Amendment, the argument is a weak one. To begin with, since it is possible, though unlikely, that Eschweiler might have concealed illegal drugs in the envelope for the safe-deposit box key, the search warrant may have authorized a search inside the envelope; and once the envelope was opened, the key within was in the agent's plain view. Admittedly this point is debatable; it seems barely conceivable that anyone would conceal cocaine in an envelope for a safe-deposit box key, and maybe government agents, even when executing a valid warrant, ought not be allowed to rummage in places where the probability of finding anything described in the warrant is extremely slight. But this we need not decide, for a container that proclaims its contents on the outside is not a private place. This point would be obvious if the envelope had been transparent; then its contents would have been literally in plain view. The inscription and other characteristics that unequivocally revealed its contents made it transparent in the contemplation of the law. See *United States v. Jacobsen*, 104 S. Ct. 1652, 1660-61 (1984); *Arkansas v. Sanders*, 442 U.S. 753, 764 n. 13 (1979) (dictum); *United States v. Bonfiglio*, 713 F.2d 932, 936-37 (2d Cir, 1983); *United States v. Norman*, 701 F.2d 295, 296-98 (4th Cir. 1983); *United States v. Buettner-Janusch*, 646 F.2d 759, 766-67 (2d Cir. 1981).

Even if, contrary to what we have just said, searching inside the envelope and seizing the key violated Eschweiler's Fourth Amendment rights, the violation was harmless. It gave the FBI nothing of significance that it did not already have. For if the envelope had been empty, this would not have negated or even weakened an inference that Eschweiler had a safe-deposit box that might contain contraband. The inference rested on the envelope, not on the key, and was reinforced by the finding of the receipt. Since the existence of the safe-deposit box thus "would inevitably have been discovered without reference to the police error" (if any) in opening the envelope and

seizing the key, the evidence obtained in the search of the box was admissible even if the key should not have been seized. *Nix v. Williams*, 104 S. Ct. 2501, 2511 (1984); see also *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (dictum) (Holmes, J.).

The only thing that gives us pause is *Walter v. United States*, 447 U.S. 649 (1980) (plurality opinion), a case with remarkable facts. Walter was a pornographer, and he sent by private carrier 12 packages containing a total of 871 boxes of pornographic homosexual films to a woman nicknamed "Leggs," who worked in Atlanta for one of his companies. Whether in ill-timed jest, or to make the shipment seem altogether on the up and up, he addressed the shipment to "Leggs, Inc." The carrier misdelivered the shipment to L'Eggs Products, Inc., the women's hosiery manufacturer, in a suburb of Atlanta. Employees of L'Eggs opened the packages and found the boxes, which disclosed their contents by graphic verbal descriptions and drawings delicately described in the Supreme Court's opinion as "suggestive." *Id.* at 652. The FBI was called, and it opened the boxes and ran the films on a projector to verify their obscene character. Walter and his associates, prosecuted for federal obscenity offenses, challenged the admissibility of the films. The Supreme Court held that the films were inadmissible; the FBI should have gotten a search warrant to open the boxes containing the reels. Eschweiler asks us to analogize the envelope containing the safe-deposit box key to the boxes containing the reels of film.

Because *Walter* is a plurality opinion, it is difficult to gauge its scope; but we are reasonably confident that it does not control the present case. Although the boxes of films were in plain view, the films themselves were not and it was merely likely, not certain, that they were obscene in the legal sense; but there was no ambiguity in the legend on the envelope in the present case. A related point is that the sensitivity of searches and seizures of materials that may be protected by the First Amendment, see, e.g., *Heller v. New York*, 413 U.S. 483,

488-89 (1973); *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091, 1093 (7th Cir. 1984), coupled with the ease with which a warrant could have been gotten in *Walter*, may have been what made the Court think a warrant required, though there could have been no doubt that it would have been issued if applied for. See *United States v. Bonfiglio*, *supra*, 713 F.2d at 938-39. Here no First Amendment interest lurks, however remotely, in the background. Moreover, the agents here had no real use or need for the key itself, whereas the films in *Walter* were vital evidence. The agents could not have walked into the bank with a key to Eschweiler's box and opened it, since they were not Eschweiler, or acting under his authority; and if they walked into the bank with a search warrant they would not need his key to open the box—the bank would open it for them. The key is a red herring. The important thing taken from the coat pocket was the envelope, and it was properly seized. Once seen it revealed its character, which led inexorably to the issuance of a warrant that we hold provided a valid basis for the search of the safe-deposit box. *United States v. Martin*, 562 F.2d 673 (D.C. Cir. 1977), on which Eschweiler relies, is not a plain-view case. See *id.* at 676 n. 6.

AFFIRMED.

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APPENDIX "B"

COURT OF APPEALS ORDER DENYING REHEARING

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 24, 19 84.

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 83-2747 vs.

ANDREW ESCHWEILER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 CR 61

Thomas R. McMillen, Judge.

ORDER

On October 10, 1984, defendant-appellant Andrew Eschweiler filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX "C"

TRIAL COURT DECISION DENYING PRE-TRIAL MOTIONS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 83 CR 61-1
	)	
ANDREW ESCHWEILER,	)	
	)	
Defendant.	)	

D E C I S I O N

Defendant filed several pretrial motions which were referred to Magistrate Sussman for his recommendations. The Magistrate filed his Report on May 13, 1983 and defendant filed exceptions to four portions of the Report.

We have examined the entire Report and Recommendation of the Magistrate and find that most of the recommendations which were not objected to by defendant were either agreed to by the prosecution or rendered moot by subsequent events. Therefore, we adopt and affirm the recommendations in paragraph I, II, III and IV, contained also in paragraphs (1), (2), (3) and (4) on pp. 16 and 17 of the Report.

Defendant objects to the Magistrate's recommendation that his motion to suppress and exclude tape recordings be denied.

These recordings were obtained by a confidential informant, Harold Abrahamson, Jr., when he was wearing a NAGRA recorder with his consent. They were used in part for the basis of obtaining two search warrants, and defendant contends that the tape recordings violated his right to privacy. In this respect, his exception is overruled as contrary to United States v. Craig, 573 F.2d 455 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1979); see also United States v. Horton, 601 F.2d 319 (7th Cir. 1979), cert. denied, 444 U.S. 937 (1979).

Defendant further contends that the informant was incompetent to sign the voluntary consent to have his conversation recorded. There is no evidence of this, defendant's argument being supported merely by affidavits of persons who believe that the informant is a little "off" or "strange." There is also evidence that he used cocaine at some time, coupled with the opinion of a psychiatrist that heavy usage of cocaine might cause delusions. There is no evidence that the informant was under the influence of cocaine at the time when he signed his consent.

We find and conclude that the government has sustained its burden to show that the informant voluntarily and knowingly engaged in the recorded conversations with the defendant, knowing that they were being taped. United States v. Glickman, 604 F.2d 625 (9th Cir. 1979), cert. denied, 444 U.S. 1080 (1980) and United States v. Horton, supra.

Defendant seeks a psychiatric examination of the informant and this can be conducted before trial if the informant is going to testify. Defendant can also use evidence at trial of cocaine usage or psychiatric distortions with respect to the recorded conversations. To obtain a psychiatric examination for the purpose of suppressing the tapes is not justified by the evidence submitted by defendant, and the procedure for obtaining a psychiatric examination before trial is not before us.

Two search warrants are contested, the first authorizing search of defendant's apartment and the second authorizing search of a safe deposit box which he maintained at the Lake Shore National Bank. We find and conclude that both search warrants were issued upon the basis of reasonable cause.

Subsequent to the Magistrate's Report of May 13, 1983, the United States Supreme Court has ruled that search warrants may be issued on the basis of circumstantial evidence even without knowing the identity of the informant. Illinois v. Gates, ___ U.S. ___, 51 U.S.L.W. 4709 (June 8, 1983). In the case at bar, the affidavits of Lynne A. Hunt in support of Search Warrant 83M45 contain not only detailed information received from informant Abrahamson over a period of several months, and extracts from the conversations recorded by him as referred to above, but are also supported by records of telephone calls to Florida from defendant's apartment, confirming many of the statements made by the informant. It boggles the imagination that the informant would

be able to supply the details and amount of information contained in the affidavit of Lynne A. Hunt if the informant were under the dominating influence of cocaine during all of the periods recited and, even if not completely accurate or true, the affidavit contains sufficient reasonable grounds for the issuance of a search warrant.

Warrant No. 83M48 for search of defendant's safety deposit box was issued after a search of defendant's apartment and is supported by another affidavit of Agent Lynne A. Hunt. In the apartment he had found a key to the safety deposit box and was told by the defendant that it was rented to his sister. The agent also found a receipt for changing a box to the current number on December 8, 1982 and information from the Lake Shore National Bank that the box had been visited on numerous occasions by the defendant subsequent to its transfer. The confidential informant advised the Special Agent that the box was used for storage of proceeds of his sales of controlled substances because of a burglary of his apartment.

Therefore, reasonable cause existed for the issuance of Search Warrants 83M45 and 83M48. Whether or not the fruits are subject to forfeiture is an issue remaining to be decided later.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the exceptions of defendant to the recommendations of Magistrate Sussman dated May 13, 1983 are overruled and his recommendations are adopted.

This case will be called to be set for trial on Tuesday, July 5, 1983 at 2:00 o'clock.

ENTER:

Thomas R. McMillen
JUDGE, UNITED STATES DISTRICT COURT

DATED: JUN 30 1983

APPENDIX D

Relevant excerpts from the federal eavesdropping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510 et seq.

18 U.S.C. §2511(2)(c):

It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. §2515:

Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency,..., or other authority of the United States...if the disclosure of that information would be violation of this chapter.

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Each violation is punishable by a fine of $10,000 or imprisonment of not more than 5 years, or both.

Paragraph (2) (a) provides that it shall not be unlawful for an operator of a switchboard or employees of a common carrier to intercept, disclose, or use wire communications in the normal course of their employment while engaged in any activity which is a necessary incident to the rendition of his service or the protection of the rights or property of the carrier. It is intended to reflect existing law (*United States v. Beckley*, 259 F.Supp. 567 (D.C. Ga. 1965)). Paragraph (2) (a) further provides that communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks. Service observing is the principal quality control procedure used by these carriers for maintaining and improving the quality of telephone service. Such observing is done by employees known as service observers, and this provision was inserted to insure that service observing will not be used for any purpose other than mechanical and service quality control.

Paragraph (2) (b) provides a similar exception for an employee of the Federal Communications Commission in the normal course of his employment in the discharge of the monitoring responsibility of the Commission.

Paragraph (2) (c) provides that it shall not be unlawful for a party to any wire or oral communication or a person given prior authority by a party to a communication to intercept such communication. It largely reflects existing law. Where one of the parties consents, it is not unlawful. (*Lopez v. United States*, 83 S.Ct. 1381, 373 U.S. 427 (1963); *Rathbun v. United States*, 78 S.Ct. 161, 355 U.S. 107 (1957); *On Lee v. United States*, 72 S.Ct. 967, 343 U.S. 747 (1952)). Consent may be expressed or implied. Surveillance devices in banks or apartment houses for institutional or personal protection would be impliedly consented to. Retroactive authorization, however, would not be possible. (*Weiss v. United States*, 60 S.Ct. 269, 308 U.S. 321 (1939)) and "party" would mean the person actually participating in the communication. (*United States v. Pasko*, 332 F. 193 (7th), *certiorari denied*, 85 S.Ct. 73, 379 U.S. 839 (1964)).

Paragraph (3) is intended to reflect a distinction between the administration of domestic criminal legislation not constituting a danger to the structure or existence of the Government and the conduct of foreign affairs. It makes it clear that nothing in the proposed chapter or other act amended by the proposed legislation is intended to limit the power of the President to obtain information by whatever means to protect the United States from the acts of a foreign power including actual or potential attack or foreign intelligence activities, or any other danger to the structure or existence of the Government. Where foreign affairs and internal security are involved, the proposed system of court ordered electronic surveillance envisioned for the administration of domestic criminal legislation is not intended necessarily to be applicable. The two areas may, however, overlap. Even though their activities take place within the United States, the domestic Communist party and its front groups remain instruments of the foreign policy of a foreign power (*Communist Party, U. S. A. v. Subversive Activities Control Board*, 81 S.Ct. 1357, 367 U.S. 1 (1961)).

(1968) U.S. Code & Ad. News 2112 at 2782
S. Rep. No. 1097, 90th Cong, 2d Sess, 93094 (1968).